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No. 88-580

In The

Supreme Court of the United States

October Term, 1988

SHELDON H. WEAVER, et al.,

Petitioner,

- against -

STATE OF NEW YORK, DEPARTMENT OF LAW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS INVOLVED

1. Whether this action, arising out of a State court order rendered in 1979, is time-barred as a claim under 42 USC § 1983.

2. Whether, in any case, the complaint states a valid claim against the defendant, the State of New York, based on the official actions of a State judicial officer.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Petitioner seeks a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered in this action on June 21, 1988, affirming unanimously, the order of the United States District Court, Western District of New York, which dismissed his complaint as time-barred.

STATEMENT OF THE CASE

The present action has its roots in a 1978 action for divorce in New York State Supreme Court, Erie

County, brought against Sheldon Weaver by his then wife, Diane Weaver. The principal assets of the marriage included the ownership of two family corporations—Weaver Manufacturing Inc. and 991 Aero Drive Inc.

During the pendency of that action, Mrs. Weaver sought and obtained an order to show cause from State Supreme Court Justice James L. Kane; the order, dated August 8, 1979 temporarily restrained a stockholders' meeting of Weaver Manufacturing Inc., and the proposed transfer of 100 additional shares of stock to Mr. Weaver in exchange for the cancellation of a debt owed him by the corporation. Mrs. Weaver maintained that the cancellation of the debt to Mr. Weaver was intended to shield his assets from the application of court orders for support, alimony and counsel fees. *See* Decision and Order A-11 *et seq.*[1]

By order dated October 10, 1979, Justice Kane granted Mrs. Weaver's motion and continued the terms of the temporary restraining order "until judgment in the divorce case * * * is finalized by voluntary compliance of the parties or after appeal, should either party do so". A judgment of divorce in favor of Mrs. Weaver was granted on October 11, 1979 and entered in the Erie County Clerk's Office on October 12, 1979. Mr. Weaver appealed that judgment to the Appellate Division of the Supreme Court, Fourth Judicial Department, which modified it in relation to the amounts of alimony and child support, and otherwise affirmed. In addition, the Appellate Division continued the temporary restraining order in relation to the transfer of corporate assets "until defendant has made

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1 References are to pages of the appendix to the petition.

all payments presently due under the judgment, at which time he may move to vacate the injunction". *Weaver v Weaver*, 78 AD2d 771 (4th Dept 1980).

Thereafter on June 11, 1985, an action was brought in the United States District Court, Western District of New York, by Sheldon H. Weaver, individually and as majority stockholder of the above-mentioned corporations, and also naming his wife, children and creditors of the corporations as plaintiffs, against the State of New York, Justice Kane and both law firms and attorneys who represented the parties in the divorce action. CIV-85-746E. The gist of the complaint was that Justice Kane, as an agent of the State, and the attorneys for the parties had conspired among themselves to act and make decisions in the divorce action which were financially ruinous to the corporations and their stockholders—principally Mr. Weaver. Thus, it was alleged the plaintiffs were deprived of property without due process of law and without compensation.

The defendants moved to dismiss the complaint on various grounds, including timeliness, lack of jurisdiction, failure to state a claim, res judicata, collateral estoppel and judicial immunity. By decision dated September 9, 1986, Hon. John T. Elfvin, District Judge, determined that the complaint attempted to state a cause of action under 42 USC § 1983 and granted the motions to dismiss the action as time-barred (A11-19). Judge Elfvin added, however, "that the Complaint could have been dismissed on most if not all, of the previously enumerated grounds" (A-17). He observed also, in a footnote, "that Sheldon H. Weaver is the only proper plaintiff in this action" (A12-13 n).

Mr. Weaver promptly moved for reconsideration of that order. Judge Elfvin denied the motion by memorandum and order dated December 31, 1986, stating that he "[had] offered nothing to strengthen his position" (A23-24). No appeal was taken from the dismissal of that action.

The action now under consideration (CIV-87-293E) was begun in March 1987, by Mr. Weaver individually and in his capacity as majority stockholder of Weaver Manufacturing Inc. and 991 Aero Drive Inc., against the State of New York. The State filed a motion to dismiss the new complaint on May 18, 1987, on the same grounds as previously and, in addition, cited the dismissal of essentially identical claims in the prior action. Judge Elfvin granted the motion in a memorandum and order dated October 2, 1987 and again dismissed the action as time-barred (A4-7). Mr. Weaver thereupon filed two separate but identical motions for reconsideration on October 14, 1987 and December 14, 1987. Both motions were denied in a memorandum and order dated February 5, 1988 (A8-10). The Second Circuit affirmed the dismissal and the award of costs to respondent in the order dated June 21, 1988 (A1-3).

ARGUMENT

THIS COMPLAINT IS TIME-BARRED AND OTHERWISE FAILS TO STATE ANY BASIS FOR RELIEF.

A

The essence of petitioner's complaint is that an injunction granted in a divorce action by a state judge was improperly issued and constituted a taking of property

without due process of law or just compensation, and an impairment of contract rights. He seeks "damages" of an unspecified nature.

As Judge Elfvin observed in his memorandum and order of September 9, 1986, the initial complaint could have been dismissed on most, if not all, of the grounds urged by the defendants. He elected to dismiss it as time-barred. The injunction at issue was granted on August 8, 1979 and was continued in the final judgment of divorce granted on October 12, 1979. On appeal by Mr. Weaver (petitioner here) to the Appellate Division, Fourth Department, from the judgment of divorce, the Court reviewed and continued the injunction until such time as he satisfied his financial obligations to his wife and children. That order was issued on October 24, 1980.

Petitioner's first action in federal court was commenced on June 11, 1985, more than five years after the injunction was first granted. Because the complaint alleged violations of due process rights under both the Federal and New York State Constitutions, but did not precisely state its jurisdictional basis, Judge Elfvin concluded that it appeared to be a claim under 42 USC § 1983. He determined that the claim was time-barred and dismissed it.

In his opposition to the motion to dismiss, petitioner argued that the statute of limitations should be tolled equitably on the ground that the wrong was a continuing one and that it was the result of a conspiracy to conceal it from him. Judge Elfvin rejected this argument, in a footnote to his decision, as follows:

> "The only apparent basis for the continuous conspiracy notion (gleaned from the Complaint rather than from the Memorandum where it was not specifically addressed) is the state court litigation between the parties which has been discussed previously. While a defendant's fraudulent concealment of a wrong may toll the statute of limitations in a section 1983 action, *Keating v. Carey*, 707 F.2d 377, 382 (2d Cir. 1983), the plaintiffs have set forth no factual predicate for such a conclusion. Indeed the plaintiffs' argument (to the extent it rises to such) that they were unaware of the existence of the alleged wrong is apparently belied by their bringing of the state court actions subsequent to the initial divorce proceedings."

As noted earlier, petitioner did not appeal from that decision and order, either before or after reconsideration was asked and denied. Judge Elfvin also dismissed the second action, likewise as untimely.

Clearly, petitioner was aware of the injunction from the time he was first served with the order to show cause in August 1979. Both he and his attorney submitted affidavits in opposition to the motion, citing a lack of jurisdiction over the corporations; he then took an appeal to the Appellate Division, which upheld and continued the injunction.

Although the statute of limitations for section 1983 actions is the most nearly appropriate state limitation period, federal law determines when a claim accrues. *Wilson v Garcia*, 471 US 261 (1985); *Okure v Owens*, 816 F2d 45 (2d Cir 1987), *cert granted*, March 21, 1987. In New York, the appropriate period of limitations is no more than three years. *Okure, supra;* CPLR 214(5). The claim arises when the person alleging injury knew or had reason to know of his injury. E.g., *Pauk v Board of Trustees, City*

University of New York, 654 F2d 856, 859 (2d Cir. 1981). The implication that petitioner was somehow prevented, by an alleged conspiracy among counsel and the court, from knowing that he had a legal means to challenge the injunction is not supported by any evidence and is belied by the fact that he did indeed take an immediate appeal to the Appellate Division. *Cf. Keating v Carey*, 706 F2d 377, 382 (2d Cir 1983). There is no basis here for an equitable tolling of the limitation period.

As has been argued in the pending *Okure* case, the State believes that the most analogous statute of limitations in New York is in the one-year provision contained in CPLR 215(3). The present claim is barred under either provision.

B

As indicated above, petitioner did not appeal from the dismissal of his first action in federal court. Instead, he commenced a second action, based on the same circumstances and for the same relief, with a change in the names but not the identity of the parties plaintiff. In this action, only the State remains as a defendant. Judge Elfvin dismissed the second action in his memorandum of October 2, 1987, with this statement:

> "This action is yet another attempt to bring the same claims before this Court. The events upon which they are based occurred more than seven years ago. They are therefore barred by the applicable statute of limitations [footnote omitted] and the defendants' other arguments, which once again appear valid, need not be considered."

Understandably, petitioner does not deny that the second action is a continuation of the first. He simply describes it as a "similar complaint" (A11).

He maintains, however, that this action is not one under section 1983, but rather under 28 USC § 1352. That section is entitled "Bonds executed under federal laws". He does not explain the connection between section 1352 and this case and defendants cannot discern any. In any event, if any cause of action existed other than under section 1983, petitioner was bound to assert it in his original action, or be precluded from doing so. Thus, not only is petitioner precluded by the state judgment affirmed on appeal, but also by his failure to assert the claim in his first federal action. *Kremer v Chemical Construction Corp.*, 456 US 461 (1982); *LaRocca v Gold*, 662 F2d 144 (2d Cir 1981); *Gramatan Home Investors Inc. v Lopez*, 46 NY2d 181 (1979).

There are, as Judge Elfvin noted, other valid defenses to this action which were not addressed in his decision. First, by virtue of the Eleventh Amendment, the federal courts lack jurisdiction to grant a money judgment against the defendant, the State of New York. *Edelman v Jordan*, 415 US 651 (1974); *Ford Motor Corp. v Department of Treasury*, 323 US 459 (1945). The claim in the prior action, against State officials, was also against the State of New York. *Pennhurst State School and Hospital v Halderman*, 465 US 89 (1984).

Nor could the petitioner maintain an action against Justice Kane in his official capacity. Judges are absolutely immune from claims for monetary damages for their judicial acts. *Stump v Sparkman*, 435 US 349 (1978); *Pierson v Ray*, 386 US 547 (1967).

C

For the foregoing reasons, respondent submits that the complaint was properly dismissed as time-barred and was also subject to dismissal on other grounds as well. The order of the District Court was properly affirmed by the Second Circuit Court of Appeals. The petitioner here has failed to advance any serious legal argument in opposition to the order of the Second Circuit, or to establish that the matter is of legal significance. Although he continues to argue that the 1979 state court injunction constituted an illegal "taking" of his property, he fails totally to address the crucial issue of timeliness or any of the other legal objections (e.g., immunity) raised by the defendant below. Consequently, no further review is warranted.

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CONCLUSION

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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